# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

## No. 252

J. HOWELL FLOURNOY, SHERIFF AND EX-OFFICIO TAX COLLECTOR,

Appellant,

*versus*

SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER,

Appellees.

Appeal from the Supreme Court of the State of Louisiana.

## ORIGINAL BRIEF IN BEHALF OF APPELLEES.

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SAMUEL G. WIENER, WILLIAM B. WIENER AND JACQUES L. WIENER,

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Appeal from the Supreme Court of the State of Louisiana.

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## ORIGINAL BRIEF IN BEHALF OF APPELLEES.

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The decision of the Court below (R. 19) is reported in 14 South. (2d) 475.

The case presents the question of the constitutional validity of Section 402(b)(2) of the Federal Revenue Act of 1942. The trial court (R. 13) held the statute to be violative of the Fifth Amendment, and of Section 8 of Article I of the Federal Constitution. The Supreme Court of the State affirmed, holding that the Fifth Amendment

rendered the statutory provision null. The Attorney General of the United States(1), having suggested in oral argument below that the question before the Court was the constitutionality of the State's action rather than that of Congress, the Supreme Court answered (R. 22) that if the Attorney General were correct, then that such construction of the State statute would in itself cause it to be violative of the Fourteenth Amendment(2). Thus the case is properly here on direct appeal (28 U. S. C. § 344(a)), because the issues draw in question the validity of a statute of the United States and the decision below was against its validity. If, however, the contention of the Attorney General below were correct, the case is reviewable by certiorari (28 U. S. C. § 344(b)), and such review would be had "under the papers whereon the appeal was allowed" (28 U. S. C. § 344(c)).

## SUMMARY STATEMENT OF THE CASE.

The case was tried on a stipulation which reveals:

Sam Wiener, Jr., a citizen of Louisiana, was married in Louisiana in 1907. He died on December 10, 1942: all assets in which he had any interest being community property. Under the law of Louisiana, he and his intended wife had been entirely free (Louisiana Civil Code, Article 2325) to make any kind of agreement they might see fit with respect to their future property relations; to make any modification or limitation to what otherwise would be the ordinary community regime (Article 2332);

(1) The Attorney General appeared in the case upon invitation of the Court, pursuant to joint motion of the parties. See R. 16.
(2) This ruling was responsive to the pleadings. See alternative plea of unconstitutionality. (R. 17).

or even, (Article 2392) to provide that there should be "no partnership between them". Having elected to make no such antenuptial agreement, the local law presumed, as an incident to the civil contract of marriage (Civil Code, Article 86), the creation of a "partnership or community of acquets or gains", which

> "consists * * * of the products of the reciprocal industry and labor of both husband and wife".
> *Civil Code, Article 2399.*

It is the settled law of Louisiana as stated by the Supreme Court of the State (R. 22) that such community is a co-ownership

> "in which the husband and wife own equal shares, their title thereto vesting at the very instant such property is acquired".

The authorities to this effect are fully displayed in the opinion of the court below, which opinion necessarily is determinative here as to the local law.(1) That such is the law of Louisiana was held by this Court in *Bender v. Pfaff, 282 U. S. 127*, affirming *38 Fed. (2d) 642*.

See also

*Poe v. Seaborn, 282 U. S. 101;*
*Goodell v. Koch, 282 U. S. 118;*
*Hopkins v. Bacon, 282 U. S. 122;*
*Warburton v. White, 176 U. S. 484;*
*Arnett v. Reade, 220 U. S. 311.*

Mr. Wiener died testate, leaving his entire estate to his three children, who are the appellees here. Such

(1) Knights of Pythias v. Meyer, 265 U. S. 30, 32; Georgia Railroad & Electric Co. v. Decatur, 295 U. S. 165, 170; Blair v. Commissioner, 300 U. S. 5, 10 (and cases cited).

"entire estate", under the local law, consisted of his undivided one-half interest in the community property. That was all that he could dispose of, or that his universal legatees could receive: this, because all that Mr. Wiener owned under the local law—and hence all that he could dispose of—was his interest in the community, namely an undivided one-half interest.

## HOW THE ISSUE ARISES.

This case originated in an action instituted by the appellees against the State Tax Collector under the provisions of Act 127 of the Extra Session of the Louisiana Legislature of 1921, which provides for a summary proceeding

> "by rule before the Court which has jurisdiction of the succession to fix the amount of tax due by each heir or legatee".

To this rule, the Tax Collector answered that the inheritance tax was due

> "on the entire community estate, rather than upon the one-half interest in the community inherited" (R. 8)

and pleaded that the inheritance tax due to the State of Louisiana was to be measured, not by what Mr. Wiener owned and transmitted to his heirs, but by the value of the entire community, in which his ownership was never more than an undivided one-half(1). He properly contends that,

(1) The stipulation reveals (R. 12; see also opinion below, R. 20) that under the contention of the appellant, the tax due to the State of Louisiana is $14,330.90, whereas, under appellee's contention, approved by the court below, such tax amounts to $8,224.09.

by an amendment to the State inheritance tax law (Act 119 of 1932, see Appendix, page 51), the inheritance tax due to the State must be in a sum equal to eighty percent of the amount of the Estate Tax exigible by the Federal Government under the Revenue Act of 1926 (44 Stat. 69; Title 26, § 410, United States Code). This, it is conceded, is the plain provision of the State statute.

But the Tax Collector goes further. He says that Section 402(b)(2), amending paragraph 811(e) of Title 26 of the United States Code, requires the inclusion in the estate of the decedent of the value at the time of his death, not merely of that which passed to his heirs under the State law, but the entirety of that property owned jointly and equally by the decedent and his surviving spouse under the law of the State of Louisiana: hence, that the State inheritance tax which must be eighty percent of the Federal tax, must be computed upon the inclusion in the taxable estate of the entire community. Thus, his contention is, of course, that, both as to valuation and as to graduated rates, the computation must be not only upon that which had been owned by the decedent and transmitted by his death, but in addition, upon the value of what had always been owned by the survivor.

Since the State statute plainly requires the exaction of a tax equal to eighty percent of the Federal tax referred to, if such Federal tax is to be based upon the inclusion in the husband's estate of the value of the entire community, the position of the Tax Collector would be correct. If, however, the Federal taxing authorities may

not base the Federal tax upon the valuation of the property owned by Mr. Wiener before his death in common with his surviving spouse, the Tax Collector is wrong.

And since the Federal statute does specifically require such inclusion, the Tax Collector is right, if the statute have legal validity. Equally clear it is that, if the statute be not valid, the appellant is wrong. The statute, of course, is valid unless it be unconstitutional. If it be unconstitutional, it simply never existed, and afforded no warrant for the appellant's contention. Appellees pleaded in the trial court that the statutory provision is violative of the due process clause of the Fifth Amendment, and of the geographical uniformity clause of Section 8 of Article I of the Federal Constitution (R. 9). The District Court sustained the plea of unconstitutionality upon both grounds (R. 13). On appeal, appellees filed an "amended and alternative plea of unconstitutionality", upon the ground that, if the action of the taxing authorities should be considered based upon the State statute, such action would contravene the due process clause of the Fourteenth Amendment (R. 17). The Supreme Court of the State (R. 25) held that the statute violated the Fifth Amendment. It also held that, if the question should be considered as arising out of State statutory authority, the contention of the Tax Collector would be violative of the Fourteenth Amendment (R. 22).(1)

(1) Thus the case could not possibly have been decided below without decision of the Federal ground. See **Abie State Bank v. Bryan, 282 U. S. 765, 773,** and cases cited.

## SUMMARY OF ARGUMENT.

As is clearly pointed out in the opinion below (R. 27) the ownership of the wife in Louisiana of an undivided one-half interest in all of the assets of the community is vested and complete. This title, moreover, is not a gratuitous one, but is one actually earned by the wife, since the law presumes all acquisitions to be the result of the joint efforts of the two spouses. (See also *19 La. Ann. 14, Succession of Costa*). Hence, not only does a wife acquire no ownership by her husband's death, but she has never been the recipient of any form of gratuity. In the eyes of the local law, she acquired the property jointly with her husband in virtue of their marital contract. The option of the intended spouses, under the Civil Code (Article 2325) to provide by antenuptial contract any form of modification of the community (Article 2424), or even to provide that there should be no community (Article 2392), or that the community should be managed jointly by husband and wife, or even by the wife alone (Article 2332), carries with it the conclusive presumption that, by failing to exercise such option, they had elected that future acquisitions should be under the regime of the ordinary community which, says the C vil Code (Article 2399),

> "consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife * * *".

Of course, the decision of the State court, on a question of State law, relating to the tenure of property, is binding here; but it happens that this Court in *Bender v. Pfaff, 282 U. S. 127*, has already held that, under the

law of Louisiana, the wife's one-half interest in the community property is hers and not something she gets by her husband's death:

> "• • • each spouse may by will dispose of only his or her one-half of the community and is powerless to affect the other's half. In case of death intestate one half descends to the heirs of the decedent and the other spouse is powerless to prevent this.
>
> "While the husband is the manager of the affairs of the marital partnership, the limitations upon the wrongful exercise of his power over community property are more stringent than in many states which have a community system".

This Court, after pointing out the absolute right of the wife during the marriage to bring about the dissolution and liquidation of the community and an accounting from the husband for acts done in fraud of her rights, concluded:

> "the wife has a present vested interest in community property equal to that of her husband".

It being settled that the estate of the husband can comprehend no more than one-half of the community, the appellees contend that it is beyond the constitutional power of Congress to include in the husband's estate the one-half which had always belonged to the wife, and then to measure the tax upon his estate, as to amount and as to graduated rates, by double the value of that of which alone his death was the generating source of passage to his heirs.

*Hoeper v. Tax Commission, 284 U. S. 206;*
*Knowlton v. Moore, 178 U. S. 41;*
*Nichols v. Coolidge, 274 U. S. 531;*
*Heiner v. Donnan, 285 U. S. 312.*

With respect to the adverse contention that the wife is vested, for the first time, at the death of the husband, with the unlimited power of disposition of her half, the position of the appellees is—as will be later more fully developed—that the husband's power of management in no manner limits the present ownership of the wife but, on the contrary, is merely a managerial arrangement which she has called into being when, under the law of Louisiana, she had had the right to modify or even to do away with it entirely. In other words, the husband's death does not confer upon the wife anything of value: on the contrary, it deprives her of the services of her chosen agent. This Court has pointed out that in states other than Louisiana, where the husband might not legally be called into account by the wife, such power of management

> "by no means negatives the wife's present interest as a co-owner".
>
> *Poe v. Seaborn, 282 U. S. 101, 113.*

But in *Bender v. Pfaff*, decided on the same day as *Poe v. Seaborn*, this Court noted that in Louisiana the wife does have the power, legally, to call the husband to account, or even to obtain an immediate dissolution of and accounting for the community, in the event the husband prove an unfit manager (282 U. S. at page 132).

Moreover, as will be later pointed out, the inclusion in the husband's estate, even merely for the purpose of valuation, of property which had always belonged to his wife, and which consequently never passed to her at his death, may result—under the high brackets of the graduated rates existing—in a tax larger than the entire amount

of that which he had owned. Even in other cases, it would impose upon those who had inherited by his death, a tax based upon the value of property in which they have no interest, and of which his death was never the cause of transmission to anyone.

## ARGUMENT.

### I.

Since it is settled, as a matter of local law, that title to community property vests *eo instanti* at its acquisition equally in husband and wife, it would seem necessarily to follow that the proposition presented is no different than would be the attempt on the part of Congress to include in the estate of any tenant in common the value of the entire interest in all property in which he had co-owners.

Of course, it is fundamental that each state has the power to determine for itself the manner and conditions upon which property situated within its boundaries may be acquired, enjoyed and transferred.

*Pennoyer v. Neff, 95 U. S. 714, 722.*

It has always been considered inconceivable that the Federal Government has power to vary the law of descent in any state.

*The Federalist, Number XXXI.*

The inclusion, therefore, in the estate of the husband of property which he never owned, with the result of imposing upon his heirs a tax liability measured by the value of that which they acquired by his death, *plus* the

value of that which belonged to someone other than the decedent, would be directly inconsistent with the due process guaranteed by the Fifth Amendment, as interpreted by this Court.

In *Hoeper v. Tax Commission, 284 U. S. 206*, a Wisconsin statute required the filing of a joint return by husband and wife for state income taxes: the combined total of income of husband and wife being then taxed according to a graduated scale. The statute was attacked as violative of the Fourteenth Amendment. Reversing the decision of the Supreme Court of Wisconsin, 202 Wis. 493, 233 N. W. 100, which had sustained the constitutionality of the act upon the ground that the statute merely retained or reestablished what was formerly an incident of the marriage relation, this Court said:

> "The question presented is whether the state has power by an income-tax law to measure his (the husband's) tax, not by his own income, but, in part, by that of another. To the problem thus stated, what was said in Knowlton v. Moore, 178 U. S. 41, 77, is apposite:
>
> > 'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.' "

After thus referring to the observations in *Knowlton v. Moore*, the Court concluded:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. (Compare Nichols v. Coolidge, 274 U. S, 531, 540."

In *Nichols v. Coolidge, 274 U. S. 531*, this Court expressly recognized the controlling effect of the Fifth Amendment upon the power of Congress in the levying of an inheritance tax. In that case, the Court held that so much of paragraph 402(c) of the Revenue Act of 1919 as required the inclusion in the gross estate of a decedent, for the purpose of estate taxation, of the value of property donated by the decedent prior to its passage, directed a taking of property without due process of law. The Court said:

> "We must conclude that §402(c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

Later, the statute stricken in *Nichols v. Coolidge*, was amended so as to provide merely that any transfer made within two years prior to the death of a decedent should be deemed to have been made in contemplation of

death and, therefore, was to be included in the estate for the purpose of measuring the estate tax. The constitutionality of this statute under the Fifth Amendment came before the Court in *Heiner v. Donnan, 285 U. S. 312*. Upon the express authority of the *Hoeper* case, the Court said:

> "The restraint imposed upon legislation by the due process clauses of the two amendments is the same. Coolidge v. Long, 282 U. S. 582, 596. That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the 5th Amendment is settled. Nichols v. Coolidge, 274 U. S. 531; Brushaber v. Union P. R. Co., 240 U. S. 1, 24, 25; Tyler v. United States, supra (281 U. S. p. 504)."

Then, after discussing the *Hoeper* case, the Court said:

> "In substance and effect, the situation presented in the Hoeper case is the same as that presented here. * * * *The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description.* Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the Schlesinger and Hoeper cases condemn as arbitrary and a denial of due process of law. *Such an exaction is not taxation but spoliation.* 'It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property'. United States v. Baltimore & O. R. Co., 17 Wall. 322, 326." (Italicizing ours).

## II.

## THE APPELLANT'S CONTENTION.

The gravamen of the contention of appellant is that this case is ruled by *Tyler v. United States, 281 U. S. 497,* and *United States v. Jacobs, 306 U. S. 363.*

As clearly pointed out by the State Supreme Court (R. 27), neither of these cases derogates in any manner from the contention accepted below.

A brief history of the statutes under which these cases were decided is appropriate.

The *Tyler* case arose under the Revenue Act of 1916 (39 Stat. at L. 756, 777, 778) where, for the first time, appeared the provision in the Internal Revenue Code (U. S. C. Title 26, § 811) and which is carried forward in the Revenue Act of 1942 in § 402(e)(1), requiring the inclusion in the value of the estate of the decedent:

> "To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the

value of such property as is proportionate to the consideration furnished by such other person: Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants."

The Court, page 505, after pointing out

"that a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process clause of the 5th amendment",

said:

"To include in the gross estate, for the purpose of measuring the tax, the value of property, no part of which originally belonged to one spouse, but which came to the tenancy, mediately or immediately, as a pure gift from the other, and which, as a consequence of the latter's death, was relieved from restrictions imposed by the law in respect to tenancy by the entirety so as to produce in the survivor the right of sole proprietorship, is obviously neither arbitrary nor capricious. The evident and legitimate aim of Congress was to prevent an avoidance, in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part, entirely appropriate as a means to that end. Taft v. Bowers, 278 U. S. 470."

Because of the peculiar technical nature of the tenure of tenancy by the entirety, wherein survivorship is of the essence, the Court moreover pointed out that, death being the generating source of the complete ownership devolving upon the survivor, it was a proper subject of taxation (page 501):

> "Death duties rest upon the principle that death is the 'generating source' from which the authority to impose such taxes takes its being' ".

Referring, then, to the complete ownership and dominion vesting in the survivor as the result of the death of the former co-tenant by the entirety, the Court said:

> "At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relative to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own."

It is clear, therefore, that the *Tyler* case rests upon these bases:

1. That it is competent for Congress to derive revenue from any gratuitous alienation which otherwise would relieve either donor or donee from the ordinary form of death or estate taxes.(1) It was visceral to the statute, and to the decision, that the interest of the survivor thus included in the estate of the decedent, should be gratuitous. The case, therefore, rests upon the same doctrine which animates the decisions sustaining gift taxes; *i. e.*

(1) Stone, J., dissenting. Helvering v. St. Louis Union Trust Co., 296 U. S. 46.

the subjection to duties to the Federal revenue of property gratuitously acquired, and which, but for the gratuity, would have formed part of the donor's estate.

2. The peculiar tenure designated "tenancy by the entirety" eventually depends upon survivorship as the cause of the vesting of complete ownership in the survivor. Death of one of the tenants, therefore, is the cause of the vesting of such title. Before death, there is one tenure. After, and solely by reason of death, another tenure, *i. e.* complete ownership and dominion comes into existence. Such vesting of *title* was, therefore, held a proper subject of the taxing power.

In *United States v. Jacobs, 306 U. S. 363*, the decision dealt with two cases. In the first case, the husband had, with his own separate funds, purchased property jointly for himself and his wife as "joint tenants". In the second case, the surviving wife had, it is true, contributed a portion of the purchase price of the property bought in joint tenancy, but that contribution, in turn, had been simply a gift from the husband. In essence, therefore, the two cases were similar. Quoting from the *Tyler* case, as authority, the Court said:

"It is clear that Congress intended by § 302 of the 1924 Act, to include in the gross estate of a decedent the full value at death of all property owned by him and any other in joint tenancy or by the entirety—irrespective of the date of the tenancy's creation—insofar as the property or consideration therefor is traceable to the decedent."

Then, dealing with the argument advanced that a different legal situation was created by a "joint tenancy" than by a "tenancy by the entirety", the Court said:

> "Only a fiction stands between the two. Survivorship is the predominant and distinguishing feature of each. The 'grand incident' of joint estates is the doctrine of survivorship, by which, when two or more persons are seized of a joint estate * * * the entire tenancy upon the decease of any of them remains to the survivor. * * *
>
> "Upon the death of her co-tenant she for the first time became possessed of the sole right to sell the entire property without risk of loss which might have resulted from partition or separate sale of her interest while decedent lived. There was, at his death, a distinct shifting of economic interest, a decided change for the survivor's benefit. The termination of a joint tenancy marked by a change in the nature of ownership of property was designated by Congress as an appropriate occasion for the imposition of a tax."

It seems patent, then, that the *Jacobs* case decided nothing more than what had been decided in the *Tyler* case, *i. e.* that the constitutional power of Congress in the premises proceeded, (1) from its power to tax gratuities, (2) from its power to tax a change of ownership directly caused and generated by the death of another.

It is worthy of note from a history of the statutes, that Congress has never conceived that, even in the case of joint tenancies or tenancies in common, the principle contended for by appellant could prevail, in the absence of the element of gift. From the inception of the statutes construed in the *Tyler* and *Jacobs* cases, the gratuitous na-

ture of the survivor's acquisition of interest has been of the essence. Nowhere in the decisions of this Court may be found a statement that the entire property under either tenure could be included in the estate of the deceased tenant, except where the survivor's interest proceeded directly or indirectly from a gift.

Considering the nature of that joint ownership which grows out of the marital partnership in Louisiana, neither the *Tyler* nor the *Jacobs* case may serve as authority for sustaining the statute under attack, because the interest of the wife does not arise out of a gratuitous title. It is as much an onerous title as is the interest of the husband. The right of the parties by ante-nuptial agreement to provide that there shall be no community (Civil Code, Article 2392); to modify the future community in any manner they might see fit (Civil Code, Articles 2325, 2424, 2332) which, of course, presupposes that the management might have been vested in the wife alone; and the statutory declaration that the relation between husband and wife is a contractual one (Civil Code, Article 86): all serve to make plain the fact that the husband and wife, jointly (Civil Code, Article 2329), earn whatever the community acquires.(*)

The decision below (R. 27) clearly points out that whatever is acquired by the community is the

> "product of the reciprocal industry and labor of both husband and wife".

See, also, 19 La. Ann. 14, *Succession of Costa.*

(*) Even Article 2807 of the Civil Code (which is found, not under the rubric of "Community or Partnership of Acquets and Gains", but under that of "Partnership") emphasizes that the common ownership of the spouses in the marital community is of contractual origin.

In the eye of the law, the carrying out by the wife of her portion of the marital duties is the complete economic equivalent of the husband's exertions on the outside. Hence, as a matter of the public policy which governs the tenure of property, the basic civil law of the State decrees that all property acquired by either, by onerous title, is owned equally and jointly by each. With that principle, Congress may not interfere. Before the adoption of the Constitution, it was pointed out in *The Federalist*, No. 31:

> "Suppose, by some forced construction of its authority, (which indeed cannot easily be imagined,) the Foederal Legislature should attempt to vary the law of descent in any State; would it not be evident, that in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State?"

We might well substitute "the law of ownership or tenure of property", and the principle would be identical. See observation of the Court in *Pennoyer v. Neff, 95 U. S. 714, 722.*

It, therefore, is clear that under the law of Louisiana, the wife's interest does not proceed from a gratuity, nor is it one whereof the husband's death is the "generating source". She owned her undivided one-half interest *ab initio*, and ownership vested in her by the same title and for the same consideration through which the husband's interest was acquired. As expressed by the Civil Code, Article 2402:

> "the period of time (i. e. during marriage) when the purchase is made is alone attended to, and not the person who made the purchase".

Apparently, in an attempt to bring the amendment of 1942 within the reasoning of the *Tyler* and the *Jacobs* cases, the writer of the statute inserted a provision seeking to except from the community property falling into the estate of a deceased spouse

> "such part thereof (i. e. of the community) as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse".

However this provision might fit into community laws of other states, we do not know. Certainly, it evinces an entire misconception of the law of Louisiana. For "compensation for personal services actually rendered" falls into the community (Civil Code, Article 2402) regardless of whether such services be rendered by the husband or by the wife, living together as such.(*)

*Succession of Manning, 107 La. 456;*
*Gastauer v. Gastauer, 143 La. 749;*
*Hellberg v. Hyland, 168 La. 493;*
*Ford v. Brooks, 35 La. Ann. 157.*

And where separate property of the surviving spouse has been used for the benefit of the community, that into which it has been converted is community property, leaving its former owner merely a creditor of the community at its dissolution:

"It is well settled that where the separate funds of one spouse have been invested in property for the

(*) Whatever argument appellant may make based upon Article 2334 of the Civil Code was rejected by the Supreme Court of the State in Houghton v. Hall, 177 La. 238.

community or otherwise properly expended for the benefit of the community, such spouse becomes a creditor of the community to that extent."

*Succession of Merrick, 35 La. Ann. 296;*
*Gee v. Thompson, 41 La. Ann. 351;*
*Sharp v. Zeller, 110 La. 61 (72);*
*Succession of Watkins, 156 La. 1000, 1004;*
*Succession of Goll, 156 La. 916.*

Thus, so far as Louisiana is concerned, the intended exception becomes meaningless. It is significant, however, as showing the thought of the author that the provision can be sustained only upon the principle that the wife's interest is a gratuitous one and its taxability thus governed by the *Tyler* and the *Jacobs* cases.

But it is argued that, inasmuch as the power vested in the husband during marriage as sole agent of the community necessarily comes to an end at his death, such death thus becomes the generating source of a valuable right to the wife which did not before exist. But in *Poe v. Seaborn, 282 U. S. 101, 112*, this Court repelled the argument that such right in the husband was an attribute of property. Repeating its previous holding in *Warburton v. White, 176 U. S. 494*, the Court pointed out:

"The obligations of the husband as agent of the community are no less real because the policy of the state limits the wife's right to call him to account in a court. Power is not synonymous with right. Nor is obligation coterminous with legal remedy. The law's investiture of the husband with broad powers by no means negatives the wife's present interest as a co-owner."

And when this Court came to the Louisiana case, *Bender v. Pfaff, 282 U. S. 127, 132*, it said:

> "While the husband is the manager of the affairs of the marital partnership, the limitations upon the wrongful exercise of his power over community property are more stringent than in many states which have a community system. In Louisiana, if the husband proves, by reason of financial difficulties or the like, an unfit manager, the wife may bring about an immediate dissolution and liquidation of the community property. Wolf v. Lowry, 10 La. Ann. 272; Webb v. Bell, 24 La. Ann. 75; Brown v. Smythe, 40 La. Ann. 325, 4 So. 300. And when the wife sues for a separation of the property she is entitled to an accounting from the husband for community income or property in his hands and to reimbursement and retribution for any act done by him in fraud of her rights. Hill v. Hill, 115 La. 489, 39 So. 503; White v. White, 159 La. 1065, 106 So. 567."

Thus, the exclusive agency of the husband for the community is no more a property right than is the power of the tutor (guardian) over the property of his ward, or that of a curator (committee) over the property of an interdict. The husband owns his one-half, the wife owns her half. He manages the joint property, because in the eye of the law, it is essential that that management be single and not divided. But, as pointed out in *Arnett v. Reade*, such power is subject to change by the legislature at any time. In Louisiana, as we have previously noted, it could have been done away with entirely by antenuptial contract; or, by the same species of agreement, the exclusive management could have been invested in the wife. Failure, whether by neglect or by intent, to do away with,

or to modify the community, or to substitute joint management, or management of the wife for that of the husband, was therefore the act of the parties. The wife here has, because she has not otherwise stipulated, herself conferred the exclusive power of management upon the husband during the existence of the community. That agency, moreover, as this Court pointed out in *Bender v. Pfaff*, is, like any other agency, charged with the duty of honest and prudent management; for the law of Louisiana gives to the wife an effective remedy against either imprudence or dishonesty which might cause pecuniary loss to her, or to the community.

Thus, the wife does not have to wait for death or divorce in order to take away from the husband the power of administration. Termination of the marital relation is not necessary in order to give the wife the right to dispose of the one-half which she already owned. If her rights are in danger, or if the husband prove an unfaithful or imprudent agent, she may terminate the agency. Thus, her position is not materially different from that of any partner where the articles of partnership provide for exclusive management by one. As long as the husband's management is prudent and honest, she has nothing to gain by divesting him of the agency; on the contrary, that would be to her injury. We are at a loss, therefore, to gather upon what theory it can be said that she secures an economic benefit by her husband's death. Of course, that event confers on her no property, for the one-half of the community had always belonged to her. She has merely lost the services of her chosen agent. If such loss could be the occasion of the exaction of a federal tax, so likewise could the termination of the

powers of the exclusive manager of a partnership, the coming of age of a minor, or the recovery of his reason by an insane person. In any of those cases, power of management and control comes into existence by the happening of an event in no whit legally different from that which is sought here to be made the occasion of an excise.

But counsel say that their position is sustained by *Moffitt v. Kelly, 218 U. S. 400.* There, the issue was the validity, under the Fourteenth Amendment, of an inheritance tax statute of California as applied to the assessment of a tax against the interest of a surviving widow in community property. At that time, the settled law of California was that the wife's interest in the community during its existence was "a mere expectancy" *(United States v. Robbins, 296 U. S. 315, 326)*, from which fact, of course, it is clear that, contrary to the doctrine in the other community states, the wife took from the husband by his death.

Subsequent legislation changed the status of the wife *quoad* her interest in the community, so that the federal inheritance tax (at least, prior to the statute here in question) no longer applied to include the wife's interest in the valuation of the husband's estate.

> *Wardell v. Blum (CCA 9th) 276 Fed. 226*, (certiorari denied *258 U. S. 618*).

And in the subsequent case of *United States v. Malcolm, 282 U. S. 792*, this Court recognized the controlling effect of the change in the local law of California, by applying to the incidence of the tax on community income

the doctrine of *Poe v. Seaborn* and *Bender v. Pfaff*. Thus, as said in *Coolidge v. Long, 282 U. S. 582, 601*, of *Moffitt v. Kelly:*

> "The state court sustained the tax upon the wife's share in the community property. This court held that the nature and character of her right was a local question and that the tax was not violative of the contract clause of the Constitution or the due process or equal protection clause of the 14th Amendment".

The Court then points out that this "local question" had been considered and decided by this Court in *United States v. Robbins* as being one that had been settled as a rule of property in California by its highest court for more than sixty years.

The local law of Louisiana was recognized by this Court in *Bender v. Pfaff* to have been settled that the wife's interest in community property is vested and equal to that of the husband. That principle is emphasized in the decision below, which conclusively states the local law so far as this Court is concerned.

*Saltonstall v. Saltonstall, 276 U. S. 260, 270,* and cases cited.

To measure the tax upon the husband's estate by the value of something which belonged to the wife or to any other co-owner would be squarely contrary to what this Court said in *Hoeper v. Tax Commissioner, 284 U. S. 206, 248*, and reaffirmed in *Heiner v. Donnan, 285 U. S. 312, 326:*

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a State to measure the tax on one person's prop-

> erty or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment."

And, we should add, equally as obnoxious to the same clause of the 5th Amendment.

*Nichols v. Coolidge, 274 U. S. 531, 543;*
*Knowlton v. Moore, 178 U. S. 41, 77.*

Language in *Moffitt v. Kelly*—plainly *obiter*, because expressly based on a pure hypothesis—postulates that the wife might have been taxed in California upon the right, assumed at her husband's death, of managing her interest free of his control; but the Court is careful to say, in the last sentence of the opinion, that

> "the nature and character of the right of the wife in the community for the purpose of taxation was peculiarly a local question which we have no power to review."

It is to be noted that the statute involved in *Moffitt v. Kelly* was a "succession tax", not an "estate tax". This is clearly pointed out in *In re Miller's Estate, 184 California, 678, 195 Pac. 413, 16 A. L. R. 694*, and in *Stebbins v. Reily, 268 U. S. 137, 143.*

Consequently, the utmost application that could be made of the *obiter* in question is that it concerns the right of a state to impose a tax *on the surviving wife*, because of her having received a thing of value by the death of the husband. There was no question in *Moffitt v. Kelly* of imposing an *estate* tax, *i. e.* one whereof the burden falls upon the heirs of the decedent, measured, both as to valuation

and as to rates, by the addition to what had been transmitted to his heirs of the value of the property already owned by his wife.

While before the Revenue Act of 1916, Congress had resorted to the principle of taxation upon the receipt of property by the survivors (see *Knowlton v. Moore, 178 U. S. 41*), yet the statute here involved, like all of its predecessors since 1916, is an estate tax.

*Riggs v. Del Drago, No. 30, October Term 1942, ___ U. S. ___.*

Statutory provisions relative to the incidence and collection of the tax emphasize. See Title 26, § 826. Thus, 826 (a), after providing for collection of the tax "under the provisions of general law", *i. e.* by assessment and distraint, goes on to authorize

> "appropriate proceedings may be commenced in any court in the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the Court".

It will be noted that it is "the property of the decedent" which may be sold. The decedent here owned only one-half of the community between him and his surviving widow. No provision authorizes the sale of her interest. The entire tax is to be paid out of that transmitted by Mr. Wiener's will to his sons, the appellees here.

It is true that by § 411 (b) of the Revenue Act of 1942, § 827 (b) of the Revenue Code purports to have been amended by imposing a secondary liability upon the surviving spouse for the estate tax to the extent of the value

of her interest; and to attach a lien to her property therefor. But Congress has never amended either § 826(a) or § 826(b): hence, under (a) no proceedings are authorized against the widow; under (b) the widow is entitled to reimbursement for the tax so paid by her.(1)

§ 826(b) provides:

> "If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor(2) in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent *the tax shall be paid out of the estate before its distribution.*" (Italics ours).

Of course, it is fundamental that the Federal government has no power to regulate tenure of property within the several states, or to affect their laws of descent and

(1) Nothing in Detroit Bank v. United States, No. 156, October Term, 1942, ... U. S. ..., affects appellees' contention here. Any contrary contention is a begging of the question, since the issue here is the constitutionality of the attempt to include the survivor's interest in the estate of the decedent; whereas, in the Detroit case, the Court merely applied Tyler v. United States.

(2) There was no executor here. The universal legatees were sent into possession unconditionally, (Civil Code, Article 940, et seq.); since the local law deprecates administration, unless necessary for the purpose of liquidation.

3 La. Ann. 502, Succession of Story;
38 La. Ann. 716, Succession of Thibodeaux;
156 La. 1000, Succession of Watkins.

distribution. Mr. Wiener's estate comprehended his one-half of the community. And, though the widow's property be declared subject to the same lien, yet it is "the estate" (*i. e.* that of the deceased husband) which is made by the statute under attack responsible ultimately for all the taxes levied upon the basis of the double of its valuation. It was the property inherited by the appellees here which was made subject to execution and forced sale for the payment of the tax, measured both as to valuation and as to graduated rates by the inclusion of property in which they had no interest whatsoever. If the widow, as we have pointed out, had paid any part of the tax, she would, under § 826(b), be entitled to reimbursement from the heirs.

This brings out in clear relief the application here of *Hoeper v. Tax Commission*, *Heiner v. Donnan*, and other cases along the same line which hold that such method of taxation is such a violation of fundamental constitutional principles as to render it obnoxious to the provisions of the Fifth and Fourteenth Amendments. As said in *Heiner v. Donnan:*

> "The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description. * * * Such an exaction is not taxation but spoliation".

Moreover, it is always to be borne in mind that the levy upon the estate, based upon a valuation of all that passed to Mr. Wiener's heirs, and then adding to that an equal value as representing what Mrs. Wiener had al-

ways owned, is not a mere matter of valuation: it greatly affects the rate of taxation. For example, if to a valuation of approximately $300,000.00, stipulated for the one-half of the community inherited by the present appellees (R. 11), there should be added the other $300,000.00 owned by the surviving widow and a level tax imposed, the result—if half the tax were payable by the widow—would be no detriment to the heirs.

But such simplicity does not inhere in this case. The rate applied for the computation of the Basic Estate Tax to an estate of $300,000.00 is 4%: to that of $600,000.00 is 5%. Likewise, the rate for the "Additional Estate Tax" applied to an estate of $300,000.00 rises to the 32% bracket, whereas in an estate of $600,000.00 the rate rises to 35%. The total Estate Tax, Basic and Additional, on the $300,000.00 estate would, as we have before observed, be $63,940.91. But one-half of the tax on the same estate wherein the widow's share was included, would be $82,297.74. Thus, the inclusion in Mr. Wiener's estate of the property which had always belonged to Mrs. Wiener would, even if Mrs. Wiener was under the primary obligation (which she is not) to pay one-half of the tax, still penalize these appellees $18,356.83. If the valuation of the entire community were, say, $6,000,000.00, the tax upon the one-half inherited by the heirs would total $1,263,200.00. But the tax to be paid by the same heirs (even if the widow paid one-half), were the valuation increased by the widow's one-half interest, would be thereby raised $305,900.00. Thus, the practical result of the impact of this form of taxation upon those who are alone, under the law of the State, entitled to share in the estate of the decedent, is graphically illustrated: even if

the collection statutes could be so construed as to require the surviving spouse to pay one-half of the amount of the tax.

This was the animating principle in the decision in *Hoeper v. Tax Commission.* For, manifestly, in the *Hoeper* case there could have been no complaint if the income tax there under consideration had been imposed at level rates. It was the graduated nature of the rates that impelled the decision of this Court that an income tax law combining the income of husband and wife, was obnoxious to the Fourteenth Amendment:

> "The assessor of incomes assessed against the appellant a tax computed on the combined total of his and his wife's incomes as shown by separate returns, treating the aggregate as his income. The amount so ascertained and assessed exceeded the sum of the taxes which would have been due had their taxable incomes been separately assessed,"

to which the Court adds the following footnote:

> "This resulted from the fact that the act provides for surtaxes graduated according to the amount of the taxpayer's net income. While the excess would have been less if returns and assessments had been made under section 71.09 (4) the total would still have been greater than the sum of the husband's and wife's taxes if separately assessed on their individual incomes."

Then, too, the confiscatory nature of the scheme embraced in the paragraph of the statute under attack, as the estate increases in value, is clearly developed in the tabulation on the opposite page, from which it will be noted that when the valuation of the entire community

reaches $5,100,000, the amount of the estate tax collectible from the heirs exceeds the total amount left by the decedent.

## TABLE FOR COMPUTATION OF ESTATE TAX

| Net estate equaling— | Net estate not exceeding— | For basic estate tax | | For additional estate tax (tentative tax—total gross basic and additional taxes) In effect after September 20, 1941 | |
|---|---|---|---|---|---|
| | | Tax on amount in column (A) | Rate of tax on excess over amount in column (A) | Tax on amount in column (A) | Rate of tax on excess over amount in column (A) |
| | | | Percent | | Percent |
| | $5,000 | | 1 | | 3 |
| $5,000 | 10,000 | $50 | 1 | $150 | 7 |
| 10,000 | 20,000 | 100 | 1 | 500 | 11 |
| 20,000 | 30,000 | 200 | 1 | 1,600 | 14 |
| 30,000 | 40,000 | 300 | 1 | 3,000 | 18 |
| 40,000 | 50,000 | 400 | 1 | 4,800 | 22 |
| 50,000 | 60,000 | 500 | 2 | 7,000 | 25 |
| 60,000 | 70,000 | 700 | 2 | 9,500 | 28 |
| 70,000 | 100,000 | 900 | 2 | 12,300 | 28 |
| 100,000 | 200,000 | 1,500 | 3 | 20,700 | 30 |
| 200,000 | 250,000 | 4,500 | 4 | 50,700 | 30 |
| 250,000 | 400,000 | 6,500 | 4 | 65,700 | 32 |
| 400,000 | 500,000 | 12,500 | 5 | 113,700 | 32 |
| 500,000 | 600,000 | 17,500 | 5 | 145,700 | 35 |
| 600,000 | 750,000 | 22,500 | 6 | 180,700 | 35 |
| 750,000 | 800,000 | 31,500 | 6 | 233,200 | 37 |
| 800,000 | 1,000,000 | 34,500 | 7 | 251,700 | 37 |
| 1,000,000 | 1,250,000 | 48,500 | 8 | 325,700 | 39 |
| 1,250,000 | 1,500,000 | 68,500 | 8 | 423,200 | 42 |
| 1,500,000 | 2,000,000 | 88,500 | 9 | 528,200 | 45 |
| 2,000,000 | 2,500,000 | 133,500 | 10 | 753,200 | 49 |
| 2,500,000 | 3,000,000 | 183,500 | 11 | 998,200 | 53 |
| 3,000,000 | 3,500,000 | 238,500 | 12 | 1,263,200 | 56 |
| 3,500,000 | 4,000,000 | 298,500 | 13 | 1,543,200 | 59 |
| 4,000,000 | 4,500,000 | 363,500 | 14 | 1,838,200 | 63 |
| 4,500,000 | 5,000,000 | 433,500 | 14 | 2,153,200 | 63 |
| 5,000,000 | 6,000,000 | 503,500 | 15 | 2,468,200 | 67 |
| 6,000,000 | 7,000,000 | 653,500 | 16 | 3,138,200 | 70 |
| 7,000,000 | 8,000,000 | 813,500 | 17 | 3,838,200 | 73 |
| 8,000,000 | 9,000,000 | 983,500 | 18 | 4,568,200 | 76 |
| 9,000,000 | 10,000,000 | 1,163,500 | 19 | 5,328,200 | 76 |
| 10,000,000 | 20,000,000 | 1,353,500 | 20 | 6,088,200 | 77 |

## ARGUMENT BASED ON MOFFITT v. KELLY COMPELS THE CONCLUSION THAT THE STATUTE IS VOID.

The application of the statute is not limited to the case where the husband died first: its language would compel its equal application where the husband is the survivor. It expressly provides that there shall be included in the taxable estate of the decedent

> "the interest therein held as community property by the decedent and surviving spouse".

Neither "decedent", nor "spouse" has particular gender. The "decedent" may well be the wife, the "surviving spouse" the husband. In such case, no one could be heard to contend that the husband had acquired any right by his wife's death. He had, in fact, lost whatever management and control he possessed during the marriage. Yet the statute operates equally in the assumed case as under the facts here involved. Moreover, as pointed out by the Supreme Court of the State, the wife may have died testate. She may have willed all her property to a stranger or to an enemy of the husband or to a paramour. In that case, the husband whose efforts had contributed so effectively to the building up of the community estate, finds himself still the owner of his original one-half, it is true, but with no power whatsoever over the other one-half; on the contrary, with the loss of its management and burdened with co-owners with whom he may be in utter disagreement.

Yet, the statute would include in the taxable estate the interest which the husband always had owned, without even a semblance of the pretext here advanced: be-

cause, instead of being invested by his wife's death with any right of management, he had lost whatever right in that respect that he had before possessed. And it is to be borne in mind that it is sought here to sustain the statute upon the contention that the wife comes into the management of her half of the community by her husband's death, and that such assumed right is the basis for constitutional authority for the provision under attack.

On settled principles, it is clear that if the statute be invalid in the case of the pre-decease of the wife, it is equally invalid in the case where it is the husband who died first.

> "By accepted canons of construction the provisions of the act in respect of this tax are not capable of separation."
>
> *Bowman v. Continental Oil Co., 256 U. S. 648.*

For here, Congress assumed to deal with the community as an entity. It carefully displayed its intent in the use of terms indifferently applicable to husband and wife. It provided for inclusion in the taxable estate of any "decedent" of the interest held as community property by the decedent and "surviving spouse". Nowhere in the statute may there be found aught upon which to hang argument that Congress would have legislated for this inclusion in the case of the husband only, or in the case of the wife alone. It was an all-inclusive provision, intended to follow the analogy of the inclusion of the entire property held by "tenants by the entirety", or by "joint tenants". In such case, even if Congress could have legislated validly to include the entire community in the case of the death of the

husband, its attempt here so to include the whole community in the case of the death of *either of the spouses* would render the entire enactment unconstitutional.

As this Court said in *Butts v. M. & M. Transp. Co., 230 U. S. 126, 134*, citing from *United States v. Reese, 92 U. S. 214:*

> "We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. * * * The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. * * * The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts to do that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings, must, annul its encroachments * * *. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

The doctrine of *United States v. Reese* is fundamental in constitutional jurisprudence. See

*Trademark Cases, 100 U. S. 82, 99;*
*Poindexter v. Greenhow, 114 U. S. 270, 304;*
*Baldwin v. Franks, 120 U. S. 678, 685;*
*Pollock v. Farmers Loan & Trust Co., 158 U. S. 601, 636;*
*Allen v. Louisiana, 103 U. S. 84;*

*United States v. Harris, 106 U. S. 641;*
*James v. Bowman, 190 U. S. 127, 140;*
*United States v. Ju Toy, 198 U. S. 253, 262;*
*Dorchy v. Kansas, 264 U. S. 286, 290;*
*Yu Cong Eng v. Trinidad, 271 U. S. 521.*

Decisions from the Circuit Courts of Appeal to the same effect are almost without number. Well considered decisions will be found in

*Pflueger v. United States, 121 Fed. (2d) 732, 735;*
*Cella Com. Co. v. Bohlinger, 147 Fed. 419 (8 L. R. A. (N. S.) 537, 542.*

But it will doubtless be argued that one may complain only when his own constitutional rights are invaded, and that, consequently, decisions upon the constitutional issue should be reserved until there be before the Court a case where the wife predeceased her husband in community.

But such argument ignores what is fundamental: that no tax may be exacted without a statute so providing, and that no statute conflicting with the Constitution may have the effect of law.

The argument, moreover, is unsound because it is to the will of Congress, as expressed in the statute, that we must look to determine whether such legal authority for the imposition of a tax exists. If the statute by any construction would have been valid had it applied to the husband alone, it must by the same reasoning be held invalid when used as the basis for measuring the estate tax on the predecease of the wife. If Congress has so enacted the statute as to require judicial legislation to separate its

effect in the two cases, *i. e.* in the death of the husband and in the death of the wife, then the statute falls as a whole, and there is no authority for the inclusion of the entire community in the case of the death of either of the spouses.

This conclusion necessarily flows from a multitude of decisions by this Court.

In *United States v. Reese, 92 U. S. 214*, the statute held unconstitutional might constitutionally have been enacted had its effect been confined to the offense for which the defendant was indicted. Because, however, its effect extended to a field in which Congress had no power, this Court held it null as a whole, and avoided the indictment:

> "We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress might rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution."

The *Reese* case was followed in the *Trademark Cases, 100 U. S. 82*, where this Court rejected the conten-

tion that the trademark statute might be sustained in part, because of the power of Congress to regulate trademarks used in commerce with foreign nations and in interstate commerce.

Again, the same doctrine was announced in *Allen v. Louisiana, 103 U. S. 80,* and in *United States v. Harris, 106 U. S. 641.*

In the leading case of *Poindexter v. Greenhow, 114 U. S. 270,* the same issue was presented in a civil proceeding. There the Court said, page 305:

> "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

In *Baldwin v. Franks, 120 U. S. 678,* Congress clearly had the power to penalize the specific offense of which the defendant was accused. But because the statute, in addition, covered other acts whose punishment was not within the power of Congress, and because a reading of the Statute demonstrated that its provisions were inseparable without judicial legislation, the Court held the entire statute unconstitutional and discharged the defendant.

The precise point was again decided in *James v. Bowman, 190 U. S. 127, 142.*

As said by Mr. Justice Holmes in *United States v. Ju Toy, 198 U. S. 253, 262:*

> "The relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again."

The whole subject is reviewed in *Butts v. M. & M. Transp. Co., 230 U. S. 126,* where, again, the punishment of the specific offense would have been within the competency of Congress, but where the statute, in general terms, included offenses not within its power of legislation.

In *Yu Cong Eng v. Trinidad, 271 U. S. 521,* the doctrine of the *Reese* case was again involved, this Court saying:

> "We fully concede that it is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation."

In the First Employers' Liability case, *Howard v. I. C. R. Co., 207 U. S. 463,* there was at issue the constitutional validity of the Act of Congress of June 11, 1906, 34 Stats. 232. The employee was killed while serving

as a fireman on a locomotive actually engaged in moving an interstate commerce train. It was conceded that Congress had the power to legislate with respect to employers' liability as to employees actually engaged in interstate commerce: just as this Court subsequently had occasion to hold in the Second Employers' Liability case, *Mondou v. N. Y., N. H. & H. R. Co., 223 U. S. 1.* This Court, however, held that the statute unambiguously covered all operations, in intrastate as well as in interstate commerce: thus including a subject matter clearly beyond the power of Congress. It, therefore, denied relief, although the decedent's injury was occasioned while he was engaged in interstate commerce, as to which Congress could validly have legislated.

In response to the argument that the statute might be sustained as to interstate commerce, this Court said:

> "The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation

with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy."

Upon a consideration of these authorities, it is, with respect, submitted that all of the argument advanced upon the theory that the wife comes into possession of a right upon the death of her husband must wholly disappear, even if it had the semblance of substance before, when it is considered that the statute operates equally upon the death of either of the spouses, and that the prior death of the wife can, in no sense of the word, be said to confer any right of any kind or character upon the husband.

## III.

## THE STATUTE IS VIOLATIVE OF THE GEOGRAPHICAL UNIFORMITY CLAUSE OF ARTICLE I, PARAGRAPH 8 OF THE CONSTITUTION OF THE UNITED STATES.

No time will be lost with discussion of the various forms in which Congress is empowered to lay taxes. They are unlimited in their manner, scope and effect, except as otherwise provided in other articles of the Constitution itself. Direct taxes may be levied in each State only in proportion to the inhabitants thereof. Excise taxes must be "uniform" throughout the United States.

Is the tax measured by this basic statutory uniformity throughout the United States? If it is not, the statute must fall.

There is a dearth of authority upon the impact of this inhibition upon the taxing power: in all probability because Congress has never before sought, plainly and unequivocally as here, to discriminate by statute against citizens of particular states.

We have no quarrel with the doctrine which will be unquestionably urged *(Knowlton v. Moore, 178 U. S. 41)* that the words "uniform throughout the United States"

> "simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate."

But if, as is basic here, each of the members of the marital partnership has a present vested equal ownership in the community property, then husband and wife are equal co-tenants of every asset of the community. They are tenants in common. They are co-owners, each in equal proportion.

If Congress had said that all property owned in indivision by co-owners should be included in the estate tax of any one of such co-owners, the Act would have been geographically uniform, however obnoxious it might have been to the due process clause of the Fifth Amendment.

But the Act does not do this. It limits its scope, and hence the amount of the tax which it imposes, to those co-owners whose co-proprietorship is in the form of the community under the law of their respective states. All other co-proprietorships are ignored.

Thus the statute, in express terms, limits its effect to that minority of states in which the community system prevails by law; for, in providing for the inclusion

> "in the value at the time of his death of all property real or personal, tangible or intangible * * * to the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any state, territory or possession of the United States * * *",

it expressly confines its effect to property held in community by virtue of a state law. It does not apply to property held under a like partnership by conventional arrangement. There is nothing in the law of many of the states that would prevent husband and wife entering into partnerships in acquiring property, holding and disposing of it under conditions and limitations similar to those under which the legal community is held in the nine states of the Union in which that system prevails by law. See *Annotation, 20 A. L. R., page 1305.*(1) Yet, in none of the cases where the common ownership and management by the husband is in effect through contract or otherwise than by the sole effect of the law of a community state in which the decedent happened to be domiciled, would the statute be effective. For example, it would not apply to the situation where husband and wife had changed their

(1) This has been recognized in many income tax cases:
Elihu, Clement and Wilson, 11 B. T. A. 965;
John T. Newell, 17 B. T. A. 93, and cases cited;
Glen M. Harrington, 21 B. T. A. 260;
Richard H. Oakley, 24 B. T. A. 1082;
N. H. Hazlewood, 29 B. T. A. 595;
J. Kammerdiner, 25 B. T. A. 495;
Rose v. Commissioner (C. C. A. Sixth), 65 Fed. (2d) 616;
Champlin v. Comer (C. C. A. Tenth), 71 Fed. (2d) 23;
Commissioner v. Barnes (C. C. A. Third), 30 Fed. (2d) 289;
Kell v. Commissioner (C. C. A. Fifth), 88 Fed. (2d) 453.

domicile to a non-community state, although for all practical purposes, the property relation thereby remained unchanged. *Beale, Conflict of Laws, § 292.1.* Its operation would be, by its own terms, limited to citizens of those states wherein the co-tenancy known as community operates through the effect of their own sovereign laws.

It would be idle to argue that this is not a departure by Congress itself from the rule of uniformity, but a result of different property laws in the states affected. Congress itself has said otherwise, in so many words, by providing that the estate tax shall be measured, not by the property of the partner in community who has died, but

> "to the extent of the interest therein held as community property by the decedent and surviving spouse *under the law of any state, territory or possession of the United States*". (Italics ours).

By express language, Congress has therefore carefully singled out the co-tenancy known as "community" as an exception to the rule that a surviving co-tenant's interest is not includible in the estate of the deceased co-tenant. For, in significant words, Congress has made this discrimination dependent upon the creation of the co-tenancy by the law of such states in which that system of ownership prevails. Thus, to discriminate, and to base such discrimination upon the municipal law of the State in which the co-owners happen to be domiciled, would seem clearly an infringement upon the constitutional requirement of geographical uniformity.

## IN CONCLUSION.

It is respectfully submitted that the judgment of the Supreme Court of Louisiana is correct and should be affirmed.

Respectfully submitted,

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# APPENDIX.


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Louisiana Statutes Cited—

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*Act 127 of Extra Session of 1921:*

Section 3. It shall be unlawful for any heir, legatee or other beneficiary of a donation mortis causa to take or be in possession of any part of the things or property composing the inheritance legacy or other donation mortis causa, or to dispose of the same or any part thereof, until he shall have obtained the authority of the Court to that effect, except as hereafter provided in Section 17; and in case he shall so take or be in possession or shall so dispose of such things or property, or any part thereof, he shall no longer have the right of renouncing such inheritance or donation mortis causa, and shall remain personally liable for the tax thereon; but he may, without waiting for authority do such acts as may seem necessary to preserve the property from waste, damage or loss.

Section 4. The executor of the will of a person deceased, or the administrator of his succession, shall, except as hereafter provided in Section 17, after payment of his debts, proceed against the tax collector and all the heirs and legatees of the deceased summarily, by rule before the court which has jurisdiction of the succession, to fix the amount of tax due by each heir or legatee, and on trial thereof the court shall render judgment for the same against each heir or legatee, with interest and costs, as hereinafter provided.

Section 5. The executor or administrator shall thereupon pay to the tax collector the amount of tax, with interest and costs, so fixed, on each inheritance, legacy or donation, out of the funds comprised therein, if sufficient. Should there not be sufficient funds, the court shall, on

the application of the heir or legatee, grant an order for the sale of the property composing such inheritance, legacy or donation, or so much thereof as may be necessary, for the purpose of paying such judgment. If the same be not paid by the heir or legatee, or an order of sale be not granted, as above provided within thirty days after the date of the judgment, the court shall, on the application of the executor or administrator, grant an order of sale for the said purpose, as above provided, and the executor or administrator shall pay the said judgment out of the proceeds of the sale.

Such sale shall be made in such manner, and on such terms and conditions as the Court shall prescribe, and the expense thereof shall be borne by the heir or legatee.

Section 6. No executor or administrator shall deliver any inheritance, or legacy until the tax thereon shall be fixed and paid, as herein provided; otherwise he, together with his surety, shall be personally liable for said tax, with interest and cost. And no executor or administrator shall be discharged until it is shown that all taxes under this Act, due by the heirs and legatees, have been paid, or until it is judicially determined by the process herein provided that no tax is due.

Section 7. In all cases in which an administration is not ordered by the court, the legal or instituted heir, or universal or residuary legatee, except as hereafter provided in Section 17, shall within six months after the death of the decedent, or, should there be a will, within the same time after the discovery of same, present to the court a

detailed descriptive list, sworn to and subscribed by him, of all items of property contained in and composing the estate of the decedent, and therein shall state the actual cash value of each such item at the time of the death of the decedent, and service thereof shall be made on the tax collector who shall have the right to traverse the same. Should the deceased have made special or particular legacies or donations mortis causa, the legatee shall also be served, and after summarily hearing the parties the court shall fix the amount of tax due as aforesaid by each such heir or legatee, and shall render judgment therefor, with interest and costs, against each of them.

Section 8. In the same manner as provided in Section 5, the heir or universal or residuary legatee shall thereupon pay or take measures for the payment of the tax due on all special or particular legacies or donations.

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*Act 119 of 1932:*

Section 1. Be it enacted by the Legislature of the State of Louisiana, That there is hereby levied, in addition to the inheritance tax as now provided by Act 127 of 1921, as amended by Act 44 of 1922, an estate transfer tax upon all estates which are subject to taxation under the Federal Revenue Act of 1926.

Section 2. Whenever the aggregate amount of all inheritance, succession, legacy and estate taxes actually paid to the several states of the United States in respect to any property owned by such decedent shall be less than eighty percent (80%) of the estate tax payable to the

United States under the provisions of the said Federal Revenue Act of 1926, but not otherwise, the difference between said amount and said eighty percent (80%) shall be paid to the State of Louisiana.

Section 3. The provisions of Act 127 of 1921 as amended by Act 44 of 1922, insofar as applicable shall regulate the proceedings to fix the amount of the tax hereby levied and the manner in which same shall be collected.

Section 4. It is hereby declared to be the intent and purpose of this Act to obtain for this state the benefit of the credit allowed under the provisions of title III, Section three hundred and one, sub-section (b), of the Federal Revenue Act of Nineteen Hundred Twenty-six to the extent that this State may be entitled by the provisions of said Act, by imposing additional taxes, and the same shall be liberally construed to effect this purpose.

Section 5. The provisions of this Act shall apply to all estates not fully distributed and now in process of settlement, where the date of death was subsequent to February twenty-six nineteen hundred twenty-six; provided there is at the time this act goes into effect a sufficient amount still due the United States Government under said Federal Revenue Act of 1926 from which to make the deduction contemplated by Section 3 hereof.

Section 6. If any section or portion of this Act be finally held to be unconstitutional by a court of competent jurisdiction such decision shall not invalidate the portions unaffected thereby.

*Articles of the Louisiana Civil Code:*

86. The law considers marriage in no other view than as a civil contract.

2325. In relation to property, the law only regulates the conjugal association, in default of particular agreements, which the parties are at liberty to stipulate as they please, provided they be not contrary to good morals, and under the modifications hereafter prescribed.

2329. Every matrimonial agreement can be altered by the husband and wife jointly before the celebration of marriage; but it cannot be altered after the celebration. Provided that in the case of married couples removing to this State and settling therein from other States and countries after marriage, they shall have the right at any time within one year after the passage of this act, or a like period after such settlement in this State, to make a valid marriage contract, subject in all other respects to the laws of this State.

2332. The partnership, or community of acquets or gains, needs not be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

2392. Married persons may stipulate that there shall be no partnership between them.

2399. Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

2402. The partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; "provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws."

2424. Married persons may, by their marriage contract, modify the legal community, as they think fit, either by agreeing that the portions shall be unequal, or by specifying the property, belonging to either of them, of which the fruits shall not enter into the partnership.